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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1198

THE TEXAS HIGHWAY DEPARTMENT, ET AL.,
Petitioners,

v.

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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April 1972

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OPINIONS BELOW

The order of the court of appeals of which review is sought (Pet. App. A) and the opinion of the district court (Pet. App. F) are unreported. The earlier opinion of the court of appeals (Pet. App. D) is reported at 446 F.2d 1013.

JURISDICTION

The order of the court of appeals denying petitioners leave to file an interlocutory appeal was entered December 20, 1971. The petition for a writ of certiorari was filed on March 17, 1972. The jurisdiction to review that order is invoked under 28 U.S.C. 1254(1).[1]

QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioners leave to appeal an interlocutory order and present an issue which the court of appeals had already conclusively resolved against them?

STATEMENT OF THE CASE

Introduction

This controversy, which returns to this Court for the third time in two years,[2] involves an effort to construct a six to eight lane federal-aid highway, the "North Expressway," through the Brackenridge-Ol-

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[1] To the extent that petitioners attempt to present issues resolved by the court of appeals in its opinion of August 5, 1971, the petition is untimely. *See* p. 13, infra.

[2] *San Antonio Conservation Society* v. *Texas Highway Dept.*, 400 U.S. 939 (1970) (stay granted); *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Dept.* 400 U.S. 961 (1970) (stay vacated); 400 U.S. 968 (1970) (*cert. denied,*); *Texas Highway Dept.* v. *Named Individual Members of the San Antonio Conservation Society*, 403 U.S. 932 (1971) (petition for certiorari, before judgment, by the state denied).

mos Basin Parklands located in San Antonio. The highway would require the use of between 116 and 250 acres of parkland and the excavation of an additional 130 acres within the parks.[3] It would be a disastrous intrusion that would disturb hundreds of thousands of people who use the parks annually.

It has been finally determined that the state and federal governments have not complied with important federal statutes[4] designed to protect parks from destruction by federal-aid highways;[5] that issue is not involved here. Instead, the only issue presented here is whether the court of appeals abused its discretion when it denied petitioners leave to appeal an interlocutory order of the district court. The question sought to be appealed was whether the state, after obtaining federal approval and federal aid for construction of this highway could circumvent federal law by allocating only state funds to this highway while shifting the federal funds to other highways within the state. Petitioners had raised that issue unsuccessfully one time in this Court, three times in the court of appeals, and one time in the district

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[3] The "fill" on which elevated portions of the highway would be built would come from three great "borrow pits" in Olmos Basin park. One hundred and thirty acres would be excavated to provide the "fill".

[4] Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f); the National Environmental Policy Act, 42 U.S.C. § 4332.

[5] *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Dept.* 446 F.2d 1013 (5th Cir. 1971); Pet. App. D, 21a-57a.

court. Thus there was no reason for the court of appeals to consider the issue again on an interlocutory appeal.

Statement Of Facts

In the mid 1950's the idea of the North Expressway was born, although no action was undertaken until the 1960's. The right-of-way cost was to be shared between the city and the state and the construction cost between the state and the federal governments. From the beginning the North Expressway was planned as a federal-aid highway and the federal government was involved at every step.

In 1961 the state sought approval for right-of-way acquisition, which the Bureau of Public Roads granted. In 1963 the state held the public hearing required by the Federal-Aid Highway Act, 23 U.S.C. § 128. In April, 1964 the Bureau of Public Roads approved that hearing. Planning for the North Expressway continued and in 1967 respondents filed this action seeking to enjoin its construction through the parklands. The Department of Transportation advised the district court that there had been no final federal approval and requested that all proceedings be stayed until a final decision had been reached.

After former Secretary Boyd completed his review he refused to approve the route unless four important design changes were incorporated. When the state refused to accept those conditions negotiations continued. Finally, in August, 1970, Secretary Volpe

approved the two segments at either end of the 9.6 mile highway, generally referred to as "end segments," which approached and actually entered the parks from both the north and the south. The state and Volpe agreed that an independent consultant would study alternative locations for the middle segment.[6] The state submitted plans, specifications, and estimates for the end segments which were approved by the Bureau of Public Roads. Under 23 U.S.C. § 106 that approval constituted "a contractual obligation of the Federal Government for the payment of its proportional contribution" for the highway. Following the § 106 approval the state began construction of the end segments and the federal government paid the state $1,818,600 for its share of the construction costs. Subsequently the court of appeals enjoined construction and further reimbursement by the federal government.

Prior Proceedings

Shortly after Volpe approved the two end segments, the district court granted the motions of the state and federal governments for summary judgment on the end segments and retained jurisdiction until the Secretary decided on the location of the "middle segment." A notice of appeal was filed and a petition for certiorari, before judgment, was filed in this Court. Certiorari was denied, 400 U.S. 968 (1970)

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[6] Once the Secretary reached a decision on the middle segment the state would have to concur or not only be ineligible for federal aid for the middle segment but also refund the amounts for the end segments.

and, over the dissents of four Justices, the Court vacated a stay previously entered. 400 U.S. 961 (1970).

After the decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971) respondents reapplied to the court of appeals for a stay, which was granted. Petitioners sought reconsideration to allow them to petition for a writ of certiorari to review the stay.

In seeking reconsideration and in their petition for certiorari, petitioners raised the same issue they now present. The state asserted that it was committed to construct the North Expressway with state funds, if necessary, and thus argued that the Secretary's failure to comply with the Department of Transportation Act and the National Environmental Policy Act was not ground for enjoining construction.[7]

The Court denied certiorari, 403 U.S. 932 (1971), and the order enjoining construction became effective immediately.

The appeal was heard on an expedited basis. The court of appeals first held that there had been no compliance with section 4(f) of the Department of Transportation Act or with the National Environmental

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[7] That issue was raised for the first time *after* the court of appeals granted the stay on May 27, 1971. At no time before, neither in their answer, their motion for summary judgment, nor in any of the appellate proceedings had petitioners claimed they were committed to construct the North Expressway with state funds. Their argument was based not on the record in the case but solely on affidavits signed after entry of the stay order and was obviously a contrived effort to circumvent federal laws.

Policy Act (Pet. App. D., pp. 21a-30a).[8] It then considered petitioners' argument that injunctive relief against construction was not proper because the state was committed to construct the highway with state funds. In support of that argument the state made what is now conceded to be a misrepresentation. It stated that its application for federal aid for the North Expressway had not been approved by the Department of Transportation and that it had received no federal aid. It conceded, however, that if the highway were constructed entirely with state funds, the federal aid allocated to the North Expressway would be used for another state highway and Texas would not forfeit any federal aid (Pet. App. D., p. 52a). The court of appeals rejected petitioners' argument. It held that since Texas had negotiated for and obtained federal approval of the North Expressway, and since federal participation had triggered substantial construction, the state had submitted itself to federal law. The court said the "State, by

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[8] The court observed that "No environmental study under N.E.P.A. has been made with respect to these two 'end segments' and the Secretary has demonstrated no effort by anyone to examine the section 4(f) 'feasible and prudent' alternatives to the route followed by these two 'end segments' . . . ." (Pet. App. D., 39a-40a). With respect to the ploy of splitting the highway into three segments and approving the two segments which reach into the park from either end, the court observed that the "Secretary's approach to his section 4(f) responsibilities makes a joke of the 'feasible and prudent alternatives' standard, and we not only decline to give such an approach our imprimatur, we specifically declare it unlawful." (Footnote omitted, Pet. App. D. 42a-43a).

entering into this venture, voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law." (Pet. App. D., p. 54a). Thus the court held that the state could not construct the highway in violation of federal law.

Judge Clark dissented. Relying on the state's misrepresentations he concluded that because the application for federal aid had not been accepted and no federal funds had been expended, the state could withdraw its application and construct the highway with its own funds, in violation of federal law (Pet. App. D., pp. 55a-57a).

The case was remanded to the district court with instructions to hold it until the Secretary of Transportation completed his review in accord with the court's decision.

Petitioners filed a petition for rehearing directed solely to that portion of the court of appeals' opinion which held that the state could not construct the highway with its own funds. The petition was denied Pet. App. E., pp. 58a-59a). *Neither the state nor the federal officials sought review in this Court.*

On remand, petitioners searched for a way to relitigate the issue which had been resolved against them. Taking their cue from Judge Clark's dissent, they attempted unilaterally to sever their relationship with the federal government and terminate their request for federal aid. Then they filed a motion to dismiss contending that the state had terminated its

relationship with the federal government and could not therefore be enjoined from construction of the highway. Petitioners continued to misrepresent that they had received no federal aid. Respondents sought to discover whether any federal funds had been transmitted and the state then conceded that it had indeed received $1,818,600 from the federal government in reimbursement for its construction costs. A stipulation to that effect was made part of the record.

The district court denied the motion to dismiss but certified the question as a controlling issue of law (Pet. App. F., pp. 60a-63a). Petitioners sought leave to appeal and raised, for the fourth time in the court of appeals, the issue of whether they could construct the North Expressway with state funds in violation of federal law. The court of appeals denied leave to appeal. Judge Clark, who had dissented earlier, concurred in the order noting that for him the evidence that federal money had been transferred was crucial, and once that had occurred the state was bound by federal law (Pet. App. A., pp. 1a-2a). It is from that unanimous order that the petitioners now seek certiorari.

REASONS FOR DENYING THE WRIT

1. The only issue presented here is whether the court of appeals abused its discretion in denying petitioners leave to appeal the district court's order denying their motion to dismiss. This Court has shown a well-founded reluctance to review interlocutory orders, particularly where the order is a discretionary

one. *E.g.*, *American Construction Co.* v. *Jacksonville T. & K.W. R. Co.*, 148 U.S. 372, 384 (1893); *Alabama* v. *United States*, 279 U.S. 229, 231 (1929). *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). There is no reason to depart from that practice here.

The issue which petitioners sought to appeal had been raised three times in the court of appeals (in opposition to a motion to stay, on the merits, and on petition for rehearing), one time in a petition for certiorari in this Court, and one time in the district court, and had been conclusively resolved. Accordingly, there was no reason for the court of appeals to permit an interlocutory appeal to consider the issue again. The fact that following remand Texas advised the federal government that it was severing their relationship did not alter the issue at all. On each occasion in the past when Texas raised this issue it argued that it was committed to proceed on its own, without federal aid. Texas sought and obtained a ruling from the court of appeals on that assumption. The fact that it then withdrew its application for federal aid, as it had previously indicated it would do, did not change the circumstances or present any new fact for consideration. If anything the developments following remand from the court of appeals confirmed the correctness of the August 5 decision. For it was then discovered that the state's application for federal aid had not only been accepted but that the state had received substantial amounts of federal aid to reimburse it for construction. Judge Clark,

who had previously supported petitioners' position in dissent, joined the majority once that fact became known (Pet. App. A, p. 2a).

Moreover, there were additional reasons why an interlocutory appeal was inappropriate. The decision of August 5 did not hold that the North Expressway could not be constructed at all, nor did it hold that it could not be constructed on the route proposed by Texas. Instead it held that construction could not proceed until state and federal officials had complied with federal and state laws[9] by analyzing the environmental impact of the highway and determining whether there are feasible and prudent alternatives to the route through the parks. Once that review is completed the state and federal officials might decide to use such an alternative and thus moot the case. On the other hand, they might determine that there are no such alternatives and if that judgment is not set aside they could construct the highway on the proposed location. A third possibility is that the federal officials could determine that alternatives are available but the state may wish to proceed along the presently proposed route. In that case the issue which petitioners seek to raise could be decided in the context of a final judgment and on the basis of a complete record. Among other things that record would reflect the extent of federal-state cooperation,

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[9] The National Environmental Policy Act, 42 U.S.C. § 4332; section 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f); and Article 5421q of the Revised Civil Statutes of Texas, which contains the same requirements as section 4(f).

something which is not entirely clear from the record presently before the Court. Thus, this is not, as petitioners argue (Pet. 12-13), the only occasion that this Court will have to consider the substantive issue and there is no need to consider the issue on interlocutory review.

Texas concedes that if certiorari is denied it will "endeavor to secure approval of the Secretary for construction of the freeway" (Pet. 13). Thus it is clear that there has been no permanent severance between the state and federal governments. Not only would denial of the petition allow the case to proceed to final judgment but it would require the state and federal officials to engage in a thorough search for alternatives, as the law clearly requires, to the use of these valuable, irreplacable parklands.[10]

(2)(a). The substantive issue of whether Texas can construct the North Expressway in violation of federal law is not properly before this Court. If, as

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[10] Petitioners' suggestion that the uncompleted portions of the highway pose hazards to safety and welfare (Pet. 6, 13) must be viewed with skepticism. When this case was here last term, in June, 1971, we stated: "Respondents have not opposed whatever maintenance work may be necessary to eliminate any safety hazards created by the court of appeals' order." Memorandum for the Respondents In Opposition at 8, n.5, *The Texas Highway Department* v. *Named Individual Members of the San Antonio Conservation Society*, 403 U.S. 932 (1971). Respondents have maintained that position throughout the litigation. Petitioners choose to write and talk about those hazards—if hazards they are—rather than to eliminate them. They have yet to engage in any work to eliminate hazards to safety or public welfare.

petitioners argue, the court of appeals has not considered and disposed of the issue on the merits, then the question should not be considered here until it has been fully briefed, argued, and decided by the court of appeals. If, as respondents contend, the court of appeals did consider and resolve the issue in its August 5 opinion, the time has expired for a petition for certiorari from that decision and the present petition, insofar as it seeks to raise that issue, is clearly untimely.[11]

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[11] Contrary to their suggestions (Pet. 13), petitioners fully understood that the substantive issue had been resolved against them in the August 5th opinion. They stated in their petition for rehearing:

> "The fairest reading is that the state is permanently barred from completing the North Expressway along a route ineligible for federal participation." Petition for Rehearing and Suggestion of Rehearing En Banc On Behalf of State Appellees at 5, *Named Individual Members of San Antonio Conservation Society* v. *Texas Highway Department*, 446 F. 2d 1013 (5th Cir. 1971).

Furthermore, their statement that the "obstacles" enumerated at pp. 15-16 of the petition prevented them from petitioning from the August 5 decision is hardly persuasive. Last term petitioners sought review of the court of appeals' stay order in the face of all those supposed "obstacles" even though the stay order was a discretionary order of the kind the Court rarely reviews.

Despite their protestations to the contrary, petitioners could have raised the substantive issue in a petition from the August 5 decision. Having failed to do so, they should not be allowed to convert a review of a denial of an interlocutory appeal into a vehicle for curing an untimely certiorari petition.

2(b). Even if the Court considers that the substantive issue is properly before it, review is not warranted. The issue here is not, as petitioners suggest (Pet. 10), whether "mere application for federal funds binds the state to" comply with federal law. Texas not only applied for federal aid, but received substantial amounts of it and began construction with that money—all before it ever attempted to sever its relationship with the federal government. Moreover, Texas does not propose to forfeit any federal aid. It will switch the federal funds allocated to the North Expressway to another route now currently planned as a state highway (Pet. App. D., p. 52a).[12] The court below was unanimous that under those circumstances Texas could not proceed with its own funds in violation of federal law. Petitioners cite no authority to the contrary.

The decision below is clearly correct. The federal government has the power to impose conditions on participation in federally funded programs (*e.g.*, *Helvering* v. *Davis*, 301 U.S. 619 (1937)) and the

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[12] In its letter to Secretary Volpe returning the $1.8 million Texas said "We have initiated a request to the Division Office of the Federal Highway Administration to restore the total Federal funds that have been obligated on the North Expressway projects back to the State of Texas' apportionment. We will appreciate your efforts in expediting the accounting procedure necessary to make these funds available for future obligation."

Although petitioners returned the federal aid, they did not pay interest on the money and thus in addition to receiving the money for other projects in the future, they had free use of the money for construction of the North Expressway.

state by choosing to participate accepts those obligations. Under the federal-aid highway legislation, once a state obtains federal approval for the location of a highway, which Texas did here as early as 1961, the highway becomes a federal-aid highway and the state, as well as the federal government, may be enjoined if it violates federal requirements. That has been the uniform holding in cases arising under the statutes involved here. *E.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *on remand* 3 ERC 1510 (W.D. Tenn. Jan. 5, 1972); *La Raza Unida* v. *Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971); *Lathan* v. *Volpe*, 3 ERC 1362 (9th Cir. Nov. 15, 1971).[13] Likewise, in other federal assistance programs if a state violates federal standards it may be enjoined and required to comply. *E.g.*, *Social Security*

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[13] In *La Raza Unida* and *Lathan* the courts held that location approval was the stage at which a highway becomes a federal-aid highway, even though federal funds would not be advanced until much later in the planning process and even though there was no assurance that federal funding would be requested or granted. In *La Raza Unida* the state had not applied for federal funds and said it probably would not do so. In *Lathan* there had been no final federal approval of the project; yet in both cases the state was held bound by federal law. The holding below follows *a fortiori* because here there had been final approval releasing federal funds for the project.

As all of the cases above indicate, the fact that there is non-compliance with federal statutes does not render the federal approval void nor prevent the highway from becoming a federal-aid route.

Act, 42 U.S.C. §§ 301-1396; *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971); *California Dept. of Human Resources Dev.* v. *Java*, 402 U.S. 121 (1971); *King* v. *Smith*, 392 U.S. 309 (1968); the Public Health Service Act, 42 U.S.C. 201 *et. seq.*; *Euresti* v. *Stenner*, (10th Cir. No. 71-1393; 40 U.S.L.W. 2652) (March 28, 1972); and grants of federal aid to education, *Bossier Parish School Bd.* v. *Lemon*, 370 F.2d 847 (5th Cir.) *cert. denied*, 388 U.S. 911 (1967).

Texas' efforts to withdraw unilaterally from the federal project and to proceed in violation of federal law came, as Judge Clark observed, "too late" (Pet. App. A., p. 2a). Texas not only obtained federal approval but it received substantial federal aid. The commitment of federal aid "triggered" the beginning of construction along the route through the parks. The effect of federal participation, and the federal government's responsibility for the decision to use the route through the parks cannot be eliminated by merely shifting federal funds to other projects in Texas. The federal-aid highway legislation does not contemplate that a state may unilaterally terminate federal involvement in an ongoing construction project. Otherwise the states would have a ready device to avoid federal-aid obligations without even forfeiting federal money.

The decision below has been approved by the third circuit as necessary to prevent a "serious erosion of the effectiveness of the new federal statutes aimed at protecting the environment." *Pennsylvania Environ-*

mental Council, Inc. v. *Bartlett*, 3 ERC 1421 (3rd Cir. Dec. 1, 1971).[14] Thus the order below is in accord with the decisions of this Court and the lower courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1972

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[14] In a similar case, *Thompson* v. *Fugate*, 452 F.2d 57 (4th Cir. 1971) the court of appeals used its broad equity power to prevent Virginia from circumventing federal-aid highway legislation. There the state proposed to use federal money for two-thirds of a circumferential highway yet allocate only state money to the remaining one-third. The one-third sought to be constructed with state funds passed through an historic site. The court of appeals enjoined condemnation of the property.

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NO. 71-

THE TEXAS HIGHWAY DEPARTMENT, ET AL.,

Petitioners

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Respondents

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON BEHALF OF CITIZENS COMMITTEE FOR COMPLETION OF THE NORTH EXPRESSWAY AND NORTH LOOP 410 ASSOCIATION, INC.

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CITIZENS COMMITTEE FOR COMPLETION OF THE NORTH EXPRESSWAY and NORTH LOOP 410 ASSOCIATION, INC., being unable to obtain consent of Respondents herein pursuant to Rule 42, move the court for leave to file a brief as Amici Curiae, in support of the Petition for Writ of Certiorari, showing cause as follows:

1. The Movant, Citizens Committee for Completion of the North Expressway, is an association of private citizens of San Antonio organized for the stated purpose of supporting the prompt completion of the North Expressway. The North Loop 410 Association, char-

tered many years ago to advance the professional and civic interest of the North Loop 410 area in San Antonio, an area which will be served by the North Expressway. Accordingly, these two organizations are vitally affected and concerned with the North Expressway, which is the subject matter of the litigation before this Court.

2. Movants aver that none of the parties will adequately present the facts of the controversy from the standpoint of the potential users and consumers, who suffer extreme and personal loss from the delay in completion of the Expressway, and who possess independent views on the issue of damage to the federal-state relationship, which is presented by this appeal.

3. The extremity of the user-consumer's plight, and the potential effect on future federal-aid projects, to include the viewpoint of these associations in these respects, are believed to be vital and necessary to the court's understanding of the present problem, and therefore relevant and useful to the disposition of the case.

WHEREFORE Movants pray leave to file a brief as Amici Curiae.

Respectfully submitted,

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